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BEFORE THE ARIZONA CORPORATION COMMISSION

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Arizona Corporation Commission

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COMMISSIONERS

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AZ CORP COMMISSION
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IN THE MATTER OF THE FORMAL
COMPLAINT OF ACCIPITER
COMMUNICATIONS, INC., AGAINST
VISTANCIA COMMUNICATIONS, L.L.C.,
SHEA SUNBELT PLEASANT POINT, L.L.C.,
AND COX ARIZONA TELCOM, LLC.

DOCKET NO. T-03471A-05-0064

MOTION TO STRIKE:

(I) STAFF ALLEGATIONS OF VIOLATIONS OF A.R.S. §§ 40-203 AND 40-321

AND

(II) ALTERNATIVES FOR IMPOSING AND CALCULATING PROPOSED FINE

Cox Arizona Telcom, LLC ("Cox") moves to strike any and all testimony in Arizona Corporation Commission Staff's rejoinder testimony that sets forth new potential violations and new bases for calculating a \$2 million-dollar fine.

In its rejoinder testimony, filed just 9 business days before trial, Staff now accuses Cox of violating both A.R.S. §§ 40-203 and 40-321 as further justification for a fine against Cox. Those alleged violations were not set forth in Staff's initial Rebuttal Testimony which specifically identified legal bases for a proposed fine (including alleged facts underlying those bases). Nor did Cox introduce any new evidence in its Rebuttal Testimony that would justify Staff adding new bases for a fine.

Staff's Rebuttal Testimony set forth the specific statutes under which Staff believes a fine may be imposed, as well as the specific basis for the calculation of a fine under those statutes.

1 However, Staff has made new assertions in its Rejoinder testimony that: (i) a fine is further
2 authorized through a cryptic reference to Title 40, Ch. 2, Art. 9 – without specific statutory citation
3 and (ii) additional methodologies to calculate the proposed fine. In the interest of due process,
4 these allegations should have been disclosed in Staff's opening Rebuttal Testimony which was
5 intended to act in lieu of Staff's complaint in this docket. The allegations certainly were not set
6 forth in the Accipiter complaint. This is particularly true given that Staff is seeking to impose a \$2
7 million fine on Cox. The newly and untimely disclosed allegations and bases for the proposed
8 fine should be stricken.

9 Not only did the Staff raise the new bases for violations in a untimely manner, as an initial
10 matter, the statutes do not impose obligations on a public service company nor do they provide the
11 Commission any additional authority to fine a PSC. A.R.S. § 40-203 states:

12 When the commission finds that the rates, fares, tolls, rentals, charges or
13 classifications, or any of them, demanded or collected by any public
14 service corporation for any service, product, or commodity, or in
15 connection therewith, or that the rules, regulations, practices or contracts,
are unjust, discriminatory or preferential, illegal or insufficient, the
commission *shall determine and prescribe them by order, as provided in
this title* [emphasis added.]

16 A.R.S. § 40-321 states:

- 17 A. When the Commission finds that the equipment, appliances,
18 facilities or service of any public service corporation, or the
19 methods of manufacture, distribution, transmission, storage or
20 supply employed by it are unjust, unreasonable, unsafe, improper,
inadequate or insufficient, the commission shall determine what is
just reasonable, safe, proper, adequate or sufficient, and shall
enforce its determination by order or regulation.
- 21 B. The commission shall prescribe regulations for the performance of
22 any service or the furnishing of any commodity and upon proper
23 demand and tender of rates, the public service corporation shall
furnish the commodity or render the service within the time and
upon the conditions prescribed.

24 Both statutes give the Commission the ability to identify conduct that it deems unacceptable, and
25 then proscribe appropriate behavior *in the future* by rule or order. The statutes do not set forth
26 specific standards – rather they use general and undefined terms that must be specifically defined
27 in any rule or order. Clearly without further detail, there can be many differing views on what is

1 unjust, unreasonable, etc. Staff never identifies any practices that have been previously
2 "proscribed" by the Commission. Apparently, Staff believes the Commission can identify, define,
3 proscribe and then fine all in one fell swoop. Regardless, Staff fails to allege with any
4 particularity how Cox's actions violate either statute, stating only on multiple occasions that the
5 issue of how Cox violated these statutes will be addressed in its brief. See Abinah Rejoinder at 4;
6 Rowell Rejoinder at 8.

7 Parties must have a notice and opportunity to be heard at a meaningful time and a
8 meaningful manner. See Arizona Constitution Article 2 § 4; Comeau v. Arizona St. Bd. Of Dental
9 Examiners, 196 Ariz. 102, 107, 993 P.2d 1066, 1071 (App. 1999); Salas v. Arizona Dept. of
10 Economic Security, 182 Ariz. 141, 143, 893 P.2d 1304, 1306 (App. 1995). This is especially true
11 when faced with a punitive sanction against it for alleged violations of Commission rules and
12 orders. Raising additional claims just nine business days before the hearing fails to give Cox any
13 meaningful notice and opportunity to be heard and defend itself against the ongoing onslaught of
14 additional charges. Further, it is outrageous that Staff would even suggest that supposed
15 violations can be addressed in briefs not even ordered yet, when Staff fails to state *any* particular
16 claim as to how these statutes are violated. Basic due process requirements are not met and Cox is
17 prejudiced by the introduction of additional allegations this close to trial. Thus, any charges
18 stemming from either A.R.S. §§ 40-203 and/or 40-321 must be dismissed or stricken for failure to
19 meet basic tenets of due process.

20 Further, Staff's newly identified methodologies for calculating its recommended fine must
21 also be stricken for violating procedural due process. See Abinah Rejoinder Testimony at 6-8. In
22 effect, Staff is now raising other conduct by Cox that in Staff's opinion could be considered
23 "unlawful." To the extent those methodologies are based on underlying facts, Cox has been
24 precluded from challenging the facts. Moreover, basing a fine on a potential future event, such as
25 speculation as to what Cox might have received in revenues is improper and inappropriate. The
26 Commission's fining authority is narrowly tailored under the statutes and Staff has an obligation
27 to provide clear and specific notice of the basis of a fine. The basis for a fine cannot be a moving

1 target or a list of hypotheticals any more than it can be an arbitrary number plucked from the air.
2 Cox was provided no notice in any prior pleadings or testimony that Staff might base its fine on
3 any of these other theories mentioned in Mr. Abinah's Rejoinder Testimony. To provide other
4 justifications this close to the hearing prejudices Cox. Therefore, Mr. Abinah's references to
5 alternative methods should be stricken.

6 Finally, and perhaps most shockingly, Mr. Abinah suggests that "the Commission should
7 not be precluded from addressing [other] violations as well simply because Staff did not raise
8 them in its testimony." Abinah Rejoinder Testimony at page 5, lines 11-19. This position is flatly
9 contrary to principles of both substantive and procedural due process. This simply eliminates any
10 due process in Cox's ability to defend itself against such as yet undetermined violations. No party
11 can be expected to defend against charges not even raised. Mr. Abinah's statement on page 5,
12 lines 11 through 19, of his Rejoinder Testimony should be stricken.

13 RESPECTFULLY SUBMITTED this 22nd day of August, 2006.

14 COX ARIZONA TELCOM, LLC.

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17 By



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1 ORIGINAL and 13 copies of the foregoing
2 filed this 22nd day of August, 2006 with:

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7 COPY of the foregoing hand-delivered
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